No. 17-340

IN THE
Supreme Court of the United States

NEW PRIME INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF FOR PETITIONER

JASON C. SCHWARTZ
JOSHUA S. LIPSHUTZ
AMANDA C. MACHIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

THEODORE J. BOUTROUS JR.
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tboutrous@gibsondunn.com

Counsel for Petitioner

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

Respondent's brief in opposition concedes two critical points, both of which counsel strongly in favor of granting New Prime, Inc.'s ("Prime") petition for a writ of certiorari.

First, respondent admits, as he must, that there is a circuit split on the first question presented: whether a dispute over applicability of the Federal Arbitration Act's ("FAA") Section 1 exemption is an arbitrability issue that must be resolved by an arbitrator pursuant to a valid delegation clause. Opp. 27-28. The First Circuit's holding that courts—and not arbitrators—must resolve the applicability of the Section 1 exemption, notwithstanding a valid delegation clause in the parties' agreement, is directly at odds with the Eighth Circuit's decision in *Green v. SuperShuttle International, Inc.*, 653 F.3d 766 (8th Cir. 2011), thereby exacerbating a preexisting split between the Eighth and Ninth Circuits. This admitted split of authority on an important question of federal law can only be resolved by this Court.

Second, respondent concedes that the First Circuit is the first and only federal court of appeals to hold that the term "contracts of employment" in Section 1 of the FAA encompasses independent-contractor agreements—i.e., contracts of *non*-employment. Opp. 15. That is a remarkable holding; the FAA was enacted nearly a century ago, and the consistent understanding and interpretation of the statute for nearly one hundred years has been the *opposite* of what the First Circuit now says it should be. *See* Pet. App. 51a ("[C]ourts generally agree that the § 1 exemption does not extend to independent contractors."). The First Circuit's counter-textual ruling not

only conflicts with decisions from the Ninth Circuit, the California Court of Appeal, and more than a dozen district courts around the country, it upsets the settled expectations of the entire transportation industry and leaves companies and workers with no viable means of ensuring their disputes are resolved in arbitration.

Not to worry, says respondent, because "the inapplicability of the Federal Arbitration Act . . . merely means that state law—rather than federal—applies to the[] enforcement" of arbitration agreements in the transportation industry. Opp. 28. But that assurance is cold comfort; the very purpose of the FAA is to overcome state-law hostility to arbitration, which still is rampant today. *See, e.g.*, *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). In fact, contrary to respondent's contention in its brief before this Court, Opp. 30-31, respondent is well aware that Prime has determined *not* to move to compel arbitration of his claims under Missouri law, in part because of the challenges of enforcing arbitration agreements under the Missouri Uniform Arbitration Act, MO. STAT. § 435.350—challenges the company would not face under the FAA.

Without this Court's review, an entire sector of the economy, in a significant portion of the country, will be denied the benefits of arbitration and the protections of federal law, and the validity of millions of independent-contractor agreements will be cast into uncertainty. This Court should grant the petition and restore the federal presumption in favor of arbitration nationwide.

I. RESPONDENT CONCEDES THERE IS A CIRCUIT SPLIT ON THE DELEGATION QUESTION.

As the district court held, "the parties do not contest that the two operating agreements . . . contain valid delegation provisions," which encompass "the arbitrability of disputes between the parties." Pet. App. 55a. Notwithstanding this valid and enforceable delegation clause, however, the First Circuit held that the district court—and not an arbitrator—must decide whether the parties' dispute is arbitrable under Section 1 of the Federal Arbitration Act. Pet. App. 16a.

Respondent concedes that the First Circuit's ruling exacerbates a circuit split between the Eighth and Ninth Circuits, siding with the latter. Opp. 26-28 (discussing *Green*, 653 F.3d 766, and *In re Van Dusen*, 654 F.3d 838 (9th Cir. 2011) (*Van Dusen I*)). Respondent derides the Eighth Circuit's analysis as "cursory" and expresses hope that the Eighth Circuit will change its mind in some unspecified future litigation. Opp. 27-28. But this split of authority is affecting litigants *now*, and has already persisted for six years without any indication it will resolve itself.

Moreover, the position taken by the First and Ninth Circuits is untenable because it destroys the benefits of arbitration in cases like this one, where a transportation worker alleges he is misclassified as an independent contractor. As Judge Ikuta pointed out in her *Van Dusen III* dissent, for a court to determine whether the Section 1 exemption applies, it must resolve the very merits issue at the heart of the case—whether the worker is, in fact, an employee—even though the parties agreed to resolve that issue in arbitration. *See In re Swift Transp. Co.*, 830 F.3d 913,

920-21 (9th Cir. 2016) ("*Van Dusen III*") (Ikuta, J., dissenting) ("[B]y requiring the parties to litigate the underlying substance of Van Dusen's claim—whether the economic realities of Van Dusen's work for Swift made Van Dusen an employee for purposes of the FLSA—the district court risks depriving Swift of the benefits of its [arbitration] contract."). As a result, any eventual arbitration would likely be rendered moot—or at minimum, the issues left for the arbitrator to decide would be trivial.

Moreover, a district-court foray into the contours of the worker's relationship with the company violates this Court's admonition that "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT&T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649-50 (1986); *see also United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568 (1960) ("The courts . . . have no business weighing the merits of the grievance.").

Respondent declares it "absurd" to think that a court might be required "to compel arbitration of the question whether they have authority under the Federal Arbitration Act to compel arbitration." Opp. 21. But there is nothing absurd or even unusual about that proposition. Any time the validity of an arbitration agreement, or the enforceability of the arbitration agreement by a particular party, is in dispute, a ruling that the agreement is invalid or cannot be enforced by the party filing the motion to compel would mean that the FAA does not apply. Yet courts routinely compel arbitration of such threshold jurisdictional issues. *See, e.g., Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) (holding that arbitrator should decide whether the arbitration agreement was valid); *Danley*

v. Encore Capital Grp., Inc., 680 F. App'x 394, 398-99 (6th Cir. 2017) (holding that arbitrator should decide the "[p]laintiffs' various arguments regarding the validity of the assignment of the arbitration agreements" from the initial lender to the defendant); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 211 (2d Cir. 2005) (holding that arbitrator should decide whether non-signatory to agreement could compel arbitration). The entire purpose of a delegation clause is to empower parties to agree to arbitrate threshold issues that would otherwise be decided by the court. *See Rent-A-Center, W., Inc.*, 561 U.S. at 70 (a delegation clause "is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce").

Respondent chastises the Eighth Circuit for "fail[ing] to address" this Court's decision in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956). *See* Opp. 27-28. But *Bernhardt* is inapposite. There, the Court granted certiorari to resolve a question regarding the weight that state arbitration laws must be given in a federal diversity case under *Erie R.R. Co. v. Tompkins*, 58 S. Ct. 817 (1938)—*not* questions of how the FAA should be interpreted or the proper application of the Section 1 exemption. *Bernhardt*, 350 U.S. at 200. The Court discussed the FAA in limited fashion only, explaining that because the underlying contract was neither a "maritime transaction" nor a contract "involving commerce," the FAA provided no basis to avoid the *Erie* issue. *Id.* at 201 (quoting 9 U.S.C. § 2). There was no discussion, however, of whether the FAA requires questions of its applicability to be resolved *in court*. And even assuming that a court would resolve such questions in a typical case, *Bernhardt* is silent about whether parties can agree to alter that default rule through a delegation

clause. *Bernhardt*, therefore, says nothing about the key question here: whether courts must enforce agreements in which the parties expressly delegate threshold questions of arbitrability to the arbitrator.

II. Respondent Concedes That the First Circuit's Decision on the Scope of the FAA Section 1 Exemption Is an Outlier.

Respondent also concedes that the First Circuit is the "first federal Court of Appeals" to hold that the Section 1 exemption applies to independent contractors. Opp. 7-8. That fact would perhaps be "unremarkable" (Opp. 1) if this were a newly enacted statute in the early stages of judicial interpretation. But Congress enacted the FAA nearly a century ago and dozens of state and federal courts have interpreted and applied the Section 1 exemption over the past hundred years. Until now, the uniform interpretation of Section 1 has been "that the § 1 exemption does not extend to independent contractors." Pet. App. 51a. Thus, the First Circuit's decision is a novel outlier that shatters the longstanding expectations of companies and workers in the transportation industry.

The Ninth Circuit, for example, has explained that "applicability of the [Section 1] exemption" turns on "the question of whether an employer/employee relationship existed between the parties." *Van Dusen I*, 654 F.3d at 840, 846. Likewise, the California Court of Appeal has held that, when assessing the applicability of the Section 1 exemption, "[t]he question [is] whether a worker is an independent contractor or an employee[.]" *Performance Team Freight Sys., Inc. v. Aleman*, 241 Cal. App. 4th 1233, 1242 (Cal. Ct. App. 2015). More than a dozen district courts—including the district court below—have also held that independent contractor agreements are not "contracts of

employment" for Section 1 purposes. Pet. 10-11 (listing cases). As the district court in this case explained, "this construction comports well with 'the FAA's purpose of overcoming judicial hostility to arbitration' and the Supreme Court's instruction 'that the § 1 exclusion provision be afforded a narrow construction' in light of that purpose." Pet. App. 52a (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001)).

Respondent denies that the case law on this issue was uniform prior to the First Circuit's decision, citing two trial-court decisions that supposedly establish a preexisting "split of authority" regarding the scope of the Section 1 exemption. Opp. 18. Of course, if respondent were correct that the lower courts were divided on this issue even before the First Circuit's decision in this case, that would only bolster Prime's arguments for certiorari.

In fact, however, it is far from clear whether the "split" described in those two decisions refers to the *manner* in which a worker may prove his employment status for purposes of determining whether the Section 1 exemption applies, or rather to the *scope* of the Section 1 exemption. *See Owner-Operator Indep. Drivers Ass'n v. C.R. England, Inc.*, 325 F. Supp. 2d 1252, 1258 (D. Utah 2004) (holding that, "[f]or the purposes of § 1 of the FAA, it is not dispositive that Plaintiffs are categorized in the Operating Agreements as employees or independent contractors," and looking instead at the nature of the parties' relationship and the workers' job functions to determine whether their agreements are "contracts of employment"); *Pac. 9 Transp., Inc. v. Labor Comm'r*, No. BC 544496, at p. 5 (Cal. Super. Ct. July 8, 2014) (merely

citing and quoting the same *Owner-Operator Independent Drivers Ass'n* decision by the District of Utah, with no further discussion of the issue).[1]

If a worker is required to prove his employment status through evidence of his job functions and the nature of his relationship with the company in order to invoke the Section 1 exemption, as the District of Utah seems to have decided, then that means the Section 1 exemption must *not* encompass independent contractors categorically, as the First Circuit held. Thus, the two trial-court decisions cited by respondent appear to be aligned with the uniform body of precedent that predated the First Circuit's outlier ruling. It is the First Circuit that created the "split of authority." (Opp. 18.)

It is no surprise that courts were aligned on this issue for nearly 100 years before the First Circuit issued its decision; it requires little analysis or exposition to interpret the term "contracts of employment" to mean contracts of *employment*. Respondent contends that the concept of employment at the time the FAA was enacted was widely understood to encompass independent contractors. Opp. 12. But that is false. Indeed, just one year after passage of the FAA, this Court explained the difference between employees and independent contractors, finding that a group of workers were not "employees" because "the performance of their contract involved the use of judgment and discretion on their part and they were required to

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[1] The decision of the Los Angeles Superior Court cited by respondent is also irrelevant because it is non-citable under California rules and was issued before the California Court of Appeal addressed the Section 1 exemption issue in *Aleman*, 241 Cal. App. 4th 1233.

use their best professional skill to bring about the desired result." *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 520-21 (1926). As this Court held, the workers' alleged employer did not have "that control or right of control by the employer which characterizes the relation of employer and employee and *differentiates the employee or servant from the independent contractor*." *Ibid.* (emphasis added). Thus, contrary to respondent's contention, reading the phrase "contracts of employment" in the FAA to include independent-contractor agreements, as the First Circuit did in this case, defied the plain language of the statute in 1925 just as it does today.

Finally, respondent urges this Court to await another vehicle for resolving this conflict. According to respondent, the same issue "is currently pending before the Ninth and Eleventh Circuits." Opp. 19. A review of the briefs filed in those cases, however, reveals that the parties presented no such issue to those courts.[2] There is no reason to believe that either court

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[2] *See* Appellants' Br. at 5-6, *Van Dusen v. Swift Transp. Co.*, No. 17-15102 (9th Cir. May 24, 2017) (issue presented for review is whether, "in determining whether agreements are contracts of employment," the district court erred by failing "to focus solely on the words of the Contractor Agreements themselves, and by choosing instead (1) to examine the entirety of the relationship that developed between Plaintiffs and Defendants after the Contractor Agreements were signed, and (2) to conflate the terms of Plaintiffs' leases . . . with the terms of the Contractor Agreements with Swift"); Appellants' Br. at 1, *Gates v. TF Final Mile, LLC*, No. 16-17717 (11th Cir. Mar. 30, 2017) (issues presented are whether the district court erred by failing "to consider or even acknowledge . . . unrebutted sworn testimony and allegations in

[*Footnote continued on next page*]

of appeals will take the giant leap of declaring that the Section 1 exemption encompasses *all* independent contractors, as the First Circuit did here. This case is the best, and only, vehicle for resolving that pressing issue.

III. The First Circuit's Decision Prevents the Transportation Industry From Enjoying the Benefits of Arbitration.

There can be no serious dispute that the First Circuit's decision has significant implications for the American economy, resulting in widespread uncertainty for an industry that generates more than half a *trillion* dollars in annual revenue. Pet. App. 16-17; Chamber of Commerce of the United States of America, Amicus Br. 9-10; *see also* Am. Trucking Ass'n, *Trucking Industry Revenues Were $676.2 Billion in 2016*, https://www.prnewswire.com/news-releases/trucking-industry-revenues-were-6762-billion-in-2016-300503843.html (last visited December 1, 2017).

The decision prevents companies and workers in the transportation industry from enforcing arbitration agreements under the FAA—tossing aside the contractual preferences of hundreds of thousands of independent owner-operators in the trucking sector alone, not to mention the millions of workers engaged in other modes of transporting goods. Am. Trucking

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[*Footnote continued from previous page*]

the Complaint" which, appellant argues, show "that Gates and other drivers are employees and not independent contractors, and thus not subject to arbitration under Section 1 of the FAA," and whether the court therefore erred by holding "Gates and the other drivers were not subject to a contract of employment").

Ass'n, Amicus Br. 5; *see* Bureau of Labor and Statistics, *Transportation and Warehousing*, https://www.bls.gov/iag/tgs/iag48-49.htm#workforce (last visited December 1, 2017). Even arbitration agreements between one company and another are at risk of invalidity under the First Circuit's decision; in this case, for example, the court of appeals applied the Section 1 exemption to a contract between a corporation and a limited liability company. *See* Pet. App. 45a (noting that Mr. Oliveira executed the operating agreements "on behalf of Hallmark Trucking LLC").

It is no answer to say, as respondent does, that companies may still look to the patchwork of state arbitration acts for relief. Opp. 28. As this Court has seen on many occasions, state laws are often significantly more unfavorable to parties attempting to compel arbitration. *See Concepcion*, 563 U.S. at 341-42 (holding that FAA preempted California doctrine that prevented enforcement of class or collective action waivers); *DirectTV*, 136 S. Ct. at 468 (reversing California state ruling that again failed to place arbitration contracts "on equal footing with all other contracts") (internal citation omitted); *Mo. Title Loans, Inc. v. Brewer*, 131 S. Ct. 2875 (2011) (Mem.) (vacating Missouri Supreme Court decision in light of *Concepcion*).

Indeed, contrary to respondent's assertion (Opp. 30), Prime has not moved to compel arbitration of respondent's claims under Missouri law—and respondent is well aware that Prime has no intention of doing so in this case. Nor should litigants be forced to rely on Missouri law, which is far more hostile to arbitration than the FAA. Unlike the FAA, the Missouri Uniform Arbitration Act disallows the enforcement of arbitration agreements contained within contracts

deemed to be "contracts of adhesion," as well as all insurance contracts. MO. STAT. § 435.350. Missouri law also hinders parties who wish to enforce class action waivers like the one in Prime's agreements with respondent. *See* Pet. App. 104a ("The Parties specifically agree that no dispute may be joined with the dispute of another and agree that class actions under this arbitration provision are prohibited"); *Brewer v. Mo. Title Loans*, 323 S.W.3d 18, 23 (Mo. 2010) (en banc) (holding that the parties' class waiver was procedurally unconscionable), *vacated and modified as recognized in* 364 S.W.3d 486 (Mo. 2012) (addressing this Court's intervening decision in *Concepcion*, but finding that the agreement in question was nonetheless unconscionable).

Forcing the transportation industry to rely on the weaker protections of state arbitration laws undermines the "liberal federal policy favoring arbitration," *Concepcion*, 563 U.S. at 339 (citation omitted), and deprives an entire sector of the economy the benefits of arbitration. This Court's review is urgently needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JASON C. SCHWARTZ
JOSHUA S. LIPSHUTZ
AMANDA C. MACHIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

THEODORE J. BOUTROUS JR.
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tboutrous@gibsondunn.com

Counsel for Petitioner

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